JUDICIAL REVIEW OF COMMISSION

RATE REGULATION — THE OHIO VALLEY CASE *

AN administrative rate-regulating order cannot constitutionally be made final; the aggrieved party must be allowed an opportunity to question the order before a court. This much was settled by *Chicago, etc. Ry. Co.* v. *Minnesota*.[1] But there remained the question as to the kind and extent of review which must be accorded. A line of cases of which *People* v. *McCall*[2] may be taken as typical seemed to stand for the doctrine that a review of questions of law (including thereby questions whether findings of fact were based on adequate evidence) was sufficient.[3] But the recent case of *Ohio Valley Water Co.* v. *Ben Avon Burrough*[4] holds

* The writer is much indebted to Professor Felix Frankfurter's course on Administrative Law at the Harvard Law School.

[1] 134 U. S. 418 (1890).

[2] 245 U. S. 345 (1917).

[3] I. C. C. *v.* Ill. Central Ry. Co., 215 U. S. 452 (1910); I. C. C. *v.* Union Pacific Ry. Co., 222 U. S. 541 (1912); I. C. C. *v.* Louisville & Nashville R. R. Co., 227 U. S. 88 (1913).

[4] Decided June 1, 1920, 253 U. S. 287, 289, 291. The case involved the following situation: Complaint was made to the Public Service Commission of Pennsylvania of the rates charged by the plaintiff Water Company. The commission heard the parties, made a valuation of the company's property for rate-making purposes, and fixed a rate calculated to yield a fair return on the valuation determined upon. A statute provided for an appeal from an order made by the commission at which the court should determine whether the order was "reasonable and in conformity with law." The company appealed under the statute, claiming the commission order confiscatory. The state Superior Court set aside the order of the commission. The state Supreme Court reversed the decision of the state Superior Court and reinstated the order of the commission. It construed the statute as limiting the state Superior Court to a review on questions of law and apparently confined itself to such a review. ("A review on questions of law" is the term used by Justice Brandeis in his dissenting opinion to describe the sort of review which the state Supreme Court judged proper. He uses it as including a consideration of whether the findings of fact by the lower tribunal were supported by adequate evidence, on the principle that inadequacy of evidence is error in law. It is here used in that same sense.) The United States Supreme Court reversed the decision of the state Supreme Court. Quotations from the majority opinion of Mr. Justice McReynolds are given in the body of the article. Mr. Justice Brandeis, in dissent, with whom were Justices Holmes and Clark, seemed to take the position that it was sufficient for a court passing on the constitutionality of an order legislative in character to give a review of questions of law.

that in some cases at least the reviewing court must exercise "its own independent judgment as to both law and facts."

Mr. Justice McReynolds, speaking for the majority, said:

"We are compelled to conclude that the [state] Supreme Court interpreted the statute as withholding from the courts power to determine the question of confiscation according to their own independent judgment when the action of the Commission comes to be considered on appeal. . . . The State must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts. . . . Plaintiff in error has not had proper opportunity for an adequate judicial hearing as to confiscation; and unless such an opportunity is now available, and can be definitely indicated by the court below in the exercise of its power finally to construe laws of the State . . . the challenged order is invalid."

It is submitted that the ultimate solution of the problem as to the extent of review which must be accorded depends on the question whether an administrative rate-regulating order shall for purposes of review and of application of the due-process clause be treated on the analogy of a judicial decision or of a legislative act. To explain this distinction it is necessary to examine how a judicial decision differs from a legislative act in each of these two respects.

First, then, to distinguish between judicial review of court action and of a legislative act. In the case of the former, the lower court has decided a past controversy according to law, has applied law. This, in the nature of things, involves findings of fact as to the controversy, and findings of the law applicable thereto. The reviewing court reviews the actual findings of law, determines whether

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The reasoning of the majority seems to be as follows: Due process requires that a state give an opportunity for the review of an administrative rate-regulating order. In the face of the claim of confiscation a review of questions of law is not enough. If, then, the state will not give a more complete review, its order will be a deprivation of property without due process of law.

The reasoning of the dissenting opinion seems to be as follows: A state must give an opportunity for the judicial review of an administrative rate-regulating order. Whether the review actually given was sufficient need not be decided, since the state did give an opportunity for a sufficient review (by another provision in the statute). However, the review proceedings actually had, might be a denial of due process by disregard of the essentials of judicial process. But such was not the case; the court reviewed questions of law. The claim of confiscation does not require this court to give more than a review of questions of law. We find no error of law. Therefore the judgment of the court below should be affirmed.

it would so have found them. As to findings of fact, ordinarily it determines only whether they were based on adequate evidence.

The so-called review of a legislative act differs radically. The legislature has laid down a rule or policy for the future, has made law. The court here does not review, as a revisory legislative body might, to determine whether it would so have legislated, but merely passes on the constitutionality of the act. Generically this is a determination whether the legislature acted within its constitutional jurisdiction when it laid down the rule. Without a constitution there could be no such thing as the judicial review of a legislative act. And the court determines constitutionality merely in the ordinary process of finding the law applicable to a judicial controversy. In review, as elsewhere, the court clings to its judicial function of applying the law. For example, a judicial case before the court is affected by a statutory rule of law. In order to determine the law applicable, the court must decide the constitutionality of the statute, quite as it must decide the common-law rule.[5] Again, a government official has confiscated property as authorized by statute. According to our law, if the act is unlawful, the official is liable. In a suit against the official, the court must therefore, to determine the lawfulness of his act, determine the constitutionality of the statute (as it must determine the common-law rule regarding an alleged trespass).[6] Again, a government official has ordered property destroyed as authorized by statute. The injured party, threatened with irreparable injury, may sue in equity to enjoin enforcement of the order on the ground of the unconstitutionality of the statute. To determine if an unlawful act is threatened, the court must first settle if the statute is constitutional.[7]

Thus the question of the constitutionality of an act comes up in the ordinary course of a court's finding the law applicable to a judicial case. By Article III of the Constitution a potential [8] right of appeal to the Supreme Court lies from its decision, since it in-

[5] Holden *v.* Hardy, 169 U. S. 366 (1898).

[6] Lawton *v.* Steele, 152 U. S. 133 (1894) (the fish-net case).

[7] Davis *v.* Gray, 16 Wall. (U. S.) 203 (1872); Scott *v.* Donald, 165 U. S. 107 (1897). See JUD. CODE, § 266; COMP. STAT., § 1243, regulating bills to enjoin enforcement of statutes on the ground of unconstitutionality.

[8] Potential because "with such exceptions and subject to such regulations as the Congress shall make." Constitution, Art. III.

volves a "federal" question. *If the reviewing court is not to go outside the judicial function of applying law, this is the only way in which it could review a legislative act.* A lower court has applied law; the reviewing court reviews the correctness of the actual decision. A legislature has made law; the reviewing court in the process of applying law determines whether the law supposedly made by the legislature really is law, determines whether the legislature acted within its constitutional jurisdiction.[9] In the one case it reviews the actual decision of another body; in the other it reviews whether that body acted within its jurisdiction. This distinction is however blurred by the fact that according to the accepted interpretation of the due-process clause, the constitutional jurisdiction of the legislature is made to depend to some extent on the substantive content of the rule laid down. That is, as regards a specific subject within the competence of the legislature, a rule expressing one legislative policy might be constitutional, while a rule expressing a different and perhaps more extreme legislative policy might not be.[10] Therefore a court in reviewing whether a legislature acted within its jurisdiction must act very much as though it were reviewing the actual legislative decision. Its function here certainly approaches a revisory legislative function — though only of a negative sort.[11] Yet in distinguishing the review of a legislative act from the review of court action, it is well to insist that the former is generically a review of whether the legislature acted within its jurisdiction.

Since the court passes upon the constitutionality of a legislative act merely in the ordinary course of finding the law applicable to a judicial controversy, it is apparent that the process of such a determination *cannot* be divided into review of law and review of

[9] A court, provided it is not to venture outside of the judicial function of applying law, can review the decision of a tribunal in the same way in which it reviews the decision of a lower court — that is to say, review the correctness of the actual decision — only when that tribunal has exercised a judicial function. This is perhaps the explanation of the rule that courts will not on certiorari review other than judicial action. Reg. *v.* Bowman, [1898] 1 Q. B. 663; Christlieb *v.* Board, 41 Minn. 142, 42 N. W. 930 (1889); Moede *v.* Board, 43 Minn. 312, 45 N. W. 438 (1890).

[10] See footnote 12, *infra*.

[11] "Called upon late in life to teach constitutional law, a great teacher of property law, after a brief trial, gave it up in despair on the ground that constitutional law 'was not law at all but politics.'" From the opening sentence of an article by Professor Felix Frankfurter in 29 HARV. L. REV. 683.

fact, as must be the process of reviewing the determination of a past controversy according to law. Any talk of such separation of process has no application to this situation. Yet though such language is not used in connection with the review of a legislative act, it seems to be found where virtually the same situation arises with respect to commission action.

Second, to distinguish the application of the due-process clause to court action and legislative action. Due process limits the substance of *legislative action*. An arbitrary legislative rule affecting life, liberty, or property might be unconstitutional where a more reasonable one would not be, the actual procedure in the discussion and adoption of the statute being the same in both cases.[12] How can this result be reached from a constitutional provision which certainly seems to lay down not a substantive but a procedural standard? The matter is discussed in *Davidson* v. *New Orleans*,[13] where it is said:

"It is easy to see that when the great barons of England wrung from King John, at the point of the sword, the concession that neither their lives nor their property should be disposed of by the crown, except as provided by the law of the land, they meant by 'law of the land' the ancient and customary laws of the English people, or laws enacted by the Parliament of which those barons were a controlling element. It was not in their minds, therefore, to protect themselves against the enactment of laws by the Parliament of England. But when, in the year of grace 1866, there is placed in the Constitution of the United States a declaration that 'no State shall deprive any person of life, liberty, or property without due process of law,' can a State make any thing due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition of the States is of no avail, or has no application where the invasion of private rights is effected under the forms of State legislation. It seems to us that a statute which declares in terms, and without more, that the full and exclusive title of a described piece of land, which is now in A., shall be and is hereby vested in B., would, if effectual, deprive A. of his property without due process of law, within the meaning of the constitutional provision."

If a state enacts and applies a statute in a procedurally valid manner, it would seem that the state's action is procedurally irre-

[12] Holden *v.* Hardy, 169 U. S. 366 (1898); Jacobson *v.* Massachusetts, 197 U. S. 11 (1905); Smyth *v.* Ames, 169 U. S. 466 (1898).

[13] 96 U. S. 97, 102 (1877).

proachable. To hold the statute invalid under the due-process clause in such a case is really to throw overboard (so far as legislative action is concerned) the conception of due process as a limitation on procedure; to say "if a legislature does this arbitrary thing, it is a violation of due process, no matter how irreproachable the procedure was," is to transform (so far as legislative action is concerned) the due-process clause from a limitation on procedure to a limitation on substance. And such is the law.

And in the case of legislative action, due process is not a limitation on procedure. Those affected by the act have no right to hearing or notice. As is pointed out in *Bi-Metallic Co.* v. *Colorado*,[14] hearing and notice, in the case of provisions of general application, are impossible; and even where feasible, as in acts of special application, are not required.

On the other hand, due process does not limit the substance of *judicial* action. The preceding discussion relative to legislative action covered the case where a court has applied an unconstitutional statute. Aside from that case, a court may lay down a judgment affecting life, liberty, or property which, however arbitrary the aggrieved party may consider it, affords no grounds for the federal question of deprivation of property without due process of law. The authorities on this point are clear. In the case of *Marchant* v. *R. R.*[15] a plaintiff was firmly convinced that she had a good cause of action. The state courts, however, held that she did not. Her appeal to the Supreme Court of the United States, on the ground that the decision of the state court deprived her of property without due process of law, was met with the decision that the proceedings in the state court were due process. In the case of *Howard* v. *Fleming* [16] it was held: "The [state] Court held that it was a common law offense. . . . Whether there be such an offense is not a Federal question." In *In re Converse* [17] the contention was made that the plaintiff's act did not in fact come within a state criminal statute, as the state court held, and that the state court's decision therefore deprived the plaintiff of liberty without

[14] 239 U. S. 441 (1915), holding that in the case of a general tax assessment hearing was not necessary.

[15] 153 U. S. 380 (1894).

[16] 191 U. S. 126, 135 (1903).

[17] 137 U. S. 624, 631 (1891).

due process of law. The Supreme Court held: "The State cannot be deemed guilty of a violation of its obligation under the Constitution of the United States because of a decision, even if erroneous, of its highest court while acting within its jurisdiction." And in *Davidson* v. *New Orleans*,[18] the court commented with disapproval upon the notion that the due-process clause is a "means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a State court of the justice of the decision against him." It is believed that there never has been a case wherein the unconstitutionality of a statute was not involved, or wherein the court's procedure was not questioned, in which the Supreme Court has overthrown the decision of a state court on the ground that the substantive result reached by the court was a deprivation of property without due process of law.

Due process perhaps does, however, limit court procedure. It may be that a federal question can be raised by the claim that the court has acted procedurally in an outrageous manner. Of course, if some statute assumes to authorize the court to adopt some outrageous procedure and the court does so, the aggrieved party can raise a federal question by challenging the constitutionality of the statute. But that is a case of the court's applying an unconstitutional statute, which is covered by the discussion above in regard to legislative action. Here, however, the question is whether in the absence of the application of an unconstitutional statute a federal question may be raised by the claim that the court's procedure was not due process of law. Diligent search has failed to reveal a single square decision to that effect.[19]

In summation, it may be said that under the due-process clause a federal question can be raised by challenging the substance of a legislative act or (perhaps) court procedure, but not by challenging the procedure of a legislative act or the substance of a judicial decision.

Why should due process be construed as limiting the substance of legislative but not of judicial action? Not because judicial

[18] 96 U. S. 97, 104 (1877).

[19] See Frank *v.* Mangum, 237 U. S. 309 (1915). It was claimed that the trial in the court below was not due process of law due to certain procedure. *Held*, that it was due process of law.

action is due process of law. That assumes the result that due process shall not limit the substance of judicial action. In the case of legislative action it might equally well be said that the proper application of a properly enacted statute was due process of law. But in that case the Supreme Court has been willing to take the step discussed in the passage quoted above from *Davidson* v. *New Orleans* and construe due process as a limitation on substance.

The explanation is doubtless to be found in the difference in theory between court and legislative action. Court action is in theory an application of law. If the result is outrageous or unjust, it must be because the law was not correctly applied. To suggest that due process limits the substance of judicial action is therefore to suggest that a person shall be able to claim a failure in *due process* merely because of an incorrect decision of his case. Where the theory is of an application of law, however, it requires too much of a strain to construe the phrase "due process of law" other than as a limitation on procedure. It is too apparent that while the Constitution may well (and, in fact, does) guarantee to every individual adequate machinery for the application of law to his case, it cannot guarantee that in every case the law will be correctly applied. The possibility of raising a federal question by challenging the substance of every judicial decision is unthinkable. But where the theory is of a making of law, it requires less strain to say that due process limits substance and that the Constitution protects the individual from the injustice of every legislative act.[20] Even here, however, one may wonder whether such a construction does not do violence to the words, if not to the intent of the provision, and whether it does not result in bringing before the Supreme Court questions to which there should "be an end" [21] in some state legislature or at most in some state Supreme Court.

Before leaving this question, one possible source of confusion may be mentioned. It is sometimes said that the substantive result of a judicial decision cannot be questioned under the due-process clause *because judicial action is due process of law.* It would

[20] This was precisely the point under discussion in the passage quoted above from Davidson *v.* New Orleans.

[21] "Somewhere there must be an end," quoted from the opinion of Mr. Justice Holmes in Chicago, etc. Ry. Co. *v.* Babcock, 204 U. S. 585, 598 (1907), holding that the Supreme Court would not review a valuation of property for purposes of taxation made by a state assessing board.

seem to follow that since the substantive result of a legislative act can be questioned under the due-process clause, legislative action is not due process of law. But that is not so. Whether or not legislative action is due process of law depends on the substance of the particular act, — just and reasonable or oppressive and arbitrary. The fallacy is that in saying "because judicial action is due process of law" one is really talking in terms of procedure. The reason why the substantive result of a judicial decision cannot be questioned under the due-process clause is not because judicial action is due process of law, but because in that case the due-process clause is not construed as a limitation on substance. The reason why the substantive result of a legislative act can be questioned under the due-process clause is that there due process is construed as a limitation on substance. The ultimate question is not whether the action "is due process of law," but whether due process is to be construed as a limitation on substance. And there seems no inherent reason why in any given case due process may not be a limitation both on procedure and on substance.

So much for the differences between court and legislative action in respect to the nature of review appropriate to each, and in respect to the nature of the application of the due-process clause to each.

It was suggested above that the problem presented by the Ohio Valley case depended for solution on whether administrative rate regulation should, as regards due process and review, be treated on the analogy of a legislative act or of a judicial decision:

A. If administrative rate regulation be regarded as an application of law, the theory of review should be that it is to determine the correctness on law and fact of the actual administrative decision.

M. If administrative rate regulation be regarded as a making of law, the theory of review should be that it is to determine whether the administrative acted within its jurisdiction when it laid down the ruling.[22]

[22] Clearly if administrative rate regulation were regarded as a making of law, a review of the actual ruling with power to amend that ruling would take the court outside of its judicial function of applying law. In Prentis *v.* Atlantic Coast Line, 211 U. S. 210, 227 (1908), administrative rate regulation was said to be legislative in substance. In that case there was a state statute providing for a review of the actual ruling with power to amend that ruling, and the court said that the duties of the state courts under the act were legislative in character. And in Reagan *v.* Farmers'

It does not seem necessary to consider any possible third category. A ruling authoritatively laid down and given legal sanction must be regarded either as a making or as an application of law.

The jurisdiction of a legislature in law-making is limited only by the Constitution, one of the constitutional limitations being that the substance of the ruling must not be so oppressive as to be a deprivation of property without due process of law. But the jurisdiction of an administrative body is more limited. Usually, if not always, such a body derives its powers from a statute which defines closely the field within which it may act. In determining whether an administrative body acted within its jurisdiction, it would therefore be necessary to consider: (1) whether it acted within its statutory jurisdiction,[23] (2) whether that statute was constitutional.

Is there a third question as to whether the administrative ruling itself was so oppressive as to be a deprivation of property without due process of law? In other words, shall the due-process clause be held to limit the substance of administrative law-making as it limits the substance of legislative law-making? On the authorities the answer seems affirmative.[24] If so, then there is a third question as to whether the administrative order was confiscatory.[25]

Loan & Trust Company, 154 U. S. 362, 400 (1894), the court said: "If a law be adjudged invalid, the court may not in the decree attempt to enact a law upon the same subject which shall be obnoxious to no legal objections. It stops with simply passing its judgment on the validity of the act before it. The same rule obtains in a case like this [a case of the judicial review of administrative rate regulation]."

[23] Louisville & Nashville R. R. Co. *v.* Garrett, 231 U. S. 298, 313 (1913). The court said: "The appropriate questions for the courts would be whether the Commission acted within the authority duly conferred by the legislature," etc. See I. C. C. *v.* Union Pacific R. R. Co., 222 U. S. 541, 547 (1912).

[24] See footnotes 34, 35, and 36: an unreasonably low rate would be unconstitutional.

[25] This would mean, however, that a federal question could be raised by attacking the substance of any administrative rate-regulating order. One may wonder whether there should not "be an end" to these questions in the state courts. Is not the Supreme Court already sufficiently burdened by the doctrine that a federal question can be raised by an attack upon the substance of any legislative act? This result could be avoided by regarding the oppressiveness of administrative law-making as raising only a question of whether the administrative acted within its statutory jurisdiction, without there being any question whether it acted within its constitutional jurisdiction. Arbitrary administrative procedure has sometimes been regarded as a matter of statutory jurisdiction rather than of constitutional right to due process of law. This is notably so in England. Local Government Board *v.* Arlidge, [1915] A. C. 120; Board of Education *v.* Rice, [1911] A. C. 179. See comments of A. V. Dicey in 31 LAW QUART.

From this it appears that the questions for review are: on view A, whether the actual decision is correct on law and fact; on view M, whether the administrative acted within its jurisdiction, including the question (and that is usually the main question) whether the order was confiscatory.[26]

What shall be the extent of review? On view A it would seem that the usual review of questions of law, with conclusive effect given to findings of fact based on adequate evidence, would be sufficient. Elsewhere in the law, facts are usually not found first by one and then by another tribunal, but facts found by the lower tribunal are gone into only sufficiently to determine that they were supported by adequate evidence. But on view M such review seems insufficient. In determining whether the rate was confiscatory, the court should not be restricted to a review of questions of law with conclusive effect given to findings of fact based on adequate evidence, but should give a review as broad as that familiarly

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REV. 148 (1915). The same view has sometimes been taken in the United States, though the courts tend to talk of constitutional right — possibly as the line of least resistance. See Colyer *v.* Skeffington, 265 Fed. 17, 47 (1920); Garfield *v.* Goldsby, 211 U. S. 249, 262 (1908). In Chin Yow *v.* United States, 208 U. S. 8 (1908), and cases following it, holding that the claim of an unfair hearing before the immigration authorities presented a matter for judicial review, it is not entirely clear on which theory the court grounds its decision. In the case of American School of Magnetic Healing *v.* McAnnulty, 187 U. S. 94 (1902), the review seems to have been on the theory of statutory jurisdiction. The cases are apt to be unsatisfactory. For example, there may be a discussion of whether certain administrative action was reasonable and it may not be clear whether that word means: (1) reasonable in procedure or substance or both, (2) reasonable as regards statutory jurisdiction, (3) reasonable as raising a federal question under the United States Constitution, (4) reasonable as showing a correct application of law.

[26] There is a real distinction between these two positions. On view M, the whole result is looked at, conceived of as a law, and the question is whether that result is confiscatory. On view A, the result is not looked at as a whole, but is split up into findings of law and findings of fact. Whether the result as a whole is confiscatory is not one of the questions of law. The most crucial part of the decision, so far as the result goes, may be findings of fact, and the only question of law in regard to them is whether they were based on adequate evidence. Indeed it seems a misnomer to speak of confiscation in this case. The only question is of the correctness of the decision on law and fact. Even if due process is construed to limit the substance of an administrative application of law (see the discussion above as to whether due process limits the substance of a judicial application of law), it still seems that there is no question as to whether the result as a whole was confiscatory. The question is still of the correctness of the decision on law and fact, but a federal question could be raised by challenging the correctness of the decision.

given in passing on the constitutionality of a legislative act.[27] This, it is believed, is the basis for the holding in the Ohio Valley case. The court there tended to take view M. It held that the courts must have "power to determine the question of *confiscation* according to their own independent judgment when the action of the commission comes to be considered on appeal." It is submitted, however, that the language of that case had reference to the determination of whether an order, legislative in substance, was confiscatory, and should not be considered to have any reference to the different situation where the court is reviewing a quasi-judicial order and determining whether the law was correctly applied. It is believed that the Ohio Valley case does not stand for any doctrine that in such a case the reviewing court, besides giving the customary review of questions of law, must enter upon an independent determination of the facts found by the administrative.

It will be observed that the basis for the constitutional right to judicial review[27a] would be different according to views A and M. On view A the basis of the right would be that before the questions of law incident to an application of law could finally be disposed of, they must come before a court as the ultimate arbiter of questions of law; that as a matter of procedure, due process required that a state accord judicial review.[28] On view M the basis of the right

[27] On view M it seems really out of place to talk of any separation of processes into findings of fact and findings of law. (See the discussion above in regard to the review of a legislative act.) Whether a law-making body acted within its jurisdiction is a question of law decided by the court in the process of finding the law. On view M, therefore, any appeal would really be analogous to the bill in equity to enjoin enforcement of a statute on the ground of unconstitutionality. In Bacon *v.* Rutland, 232 U. S. 134, 138 (1914), the court said: "It is apparent on the face of these sections that they do not attempt to confer legislative powers upon the court. They only provide an alternative and more expeditious way of doing what might be done by a bill in equity." A review of questions of law is, then, really sufficient to determine whether the rate was confiscatory. But when it is said "a review of questions of law with conclusive effect given to findings of fact based on adequate evidence," or words to that effect, the context shows that reference is made to *what would be the questions of law were administrative rate regulation regarded as an application of law*, and it is submitted that a review of those questions would not be sufficient to determine whether the rate was confiscatory. As stated above, when administrative rate regulation is regarded as an application of law, whether the rate as a whole is confiscatory is not one of the question of law.

[27a] See opening sentence of article.

[28] See quotation below from the majority opinion in Chicago, etc. Ry. Co. *v.* Minnesota.

would be that, as in the case of a legislative act alleged to be oppressive, a party would have by Article III a constitutional right to raise the issue of confiscation.[29]

The authorities have vacillated between these two positions, frequently with none too clear a differentiation between them. The split extends back to the leading case on the subject (*Chicago, etc. Ry. Co.* v. *Minnesota*),[30] in which the majority tended to take position A, while Mr. Justice Miller, in his concurring opinion, tended to take position M.

Mr. Justice Blatchford, speaking for the majority, said:[31]

"If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived from the lawful use of its property . . . without due process of law."

Mr. Justice Miller in his concurring opinion said:[32]

"Neither the legislature nor such commission acting under the authority of the legislature, can establish . . . a tariff . . . which is so unreasonable as to practically destroy the value of property of persons engaged in the carrying business on the one hand, nor so exorbitant and extravagant as to be in utter disregard of the rights of the public for the use of such transportation on the other.

"In either of these classes of cases there is an ultimate remedy . . ., in the courts, for relief against such oppressive legislation, and especially in the courts of the United States, where the tariff of rates established either by the legislature or by the commission is such as to deprive a party of his property without due process of law."

On the one view it is a failure in due process as a limitation on procedure not to have some court action; on the other it is a failure in due process as a limitation on substance if the ruling is oppressive. The manner in which Mr. Justice Miller assimilates the cases of administrative and legislative rate making seems especially significant.

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[29] In Louisville & Nashville R. R. Co. *v.* Garrett, 231 U. S. 298 (1913), it was held that the due-process requirement of review was completely satisfied in the absence of statutory provisions as to review, since the aggrieved party could avail himself of a suit in equity to enjoin enforcement of the order on the ground of unconstitutionality.

[30] 134 U. S. 418 (1890).

[31] *Ibid.*, 458.

[32] *Ibid.*, 459.

Since this case the split has remained discernible. The line of cases represented by *People* v. *McCall* [33] standing for the doctrine that judicial review of questions of law, with conclusive effect given to findings of fact based on adequate evidence, is sufficient, seems really to follow view A. The line of cases now to be examined, holding that the reviewing court must consider whether the regulation was confiscatory, clearly show the influence of Mr. Justice Miller's reasoning, and tend to take position M.

In *Reagan* v. *Farmers' Loan and Trust Co.*[34] the court, following Mr. Justice Miller, assimilated the cases of legislative and administrative rate making, saying:

"There can be no doubt of their [the courts'] power and duty to inquire whether a body of rates prescribed by a legislature or a commission is unjust and unreasonable."

In *Smyth* v. *Ames* [35] the court again assimilated the cases of legislative and of administrative rate making, saying:

"A state enactment, or regulations made under the authority of a state enactment, establishing rates for the transportation of persons or property by railroad that will not admit of the carrier earning such compensation as under all the circumstances is just to it and to the public, would deprive such carrier of its property without due process of law."

In *Louisville & Nashville R. R. Co.* v. *Garrett* [36] the court said:

"The appropriate questions for the courts would be whether the Commission acted within the authority duly conferred by the legislature, and also, so far as the amount of compensation permitted by the prescribed rates is concerned, whether the Commission went beyond the domain of the State's legislative power and violated the constitutional rights of property by imposing confiscatory requirements."

But there has been in the cases no sharp distinction between views A and M. Even in the cases cited above as tending toward view A, there is language sounding as though the court would consider whether the rate itself was confiscatory. The suggestion seems to be that that question can be decided by giving a review

[33] See footnote 3, *supra*.
[34] 154 U. S. 362, 397 (1894).
[35] 169 U. S. 466, 526 (1898).
[36] 231 U. S. 298, 313 (1913).

of questions of law with conclusive effect given to findings of fact based on adequate evidence. But surely this view is not sound and is repudiated by the Ohio Valley case. Does it not result from insufficient differentiation of judicial and legislative action and of the kind of review properly applicable to each?

It will also be observed that the question before the Supreme Court would be different according to views A and M. Whereas on view A the question before the Supreme Court is merely whether the state granted sufficient judicial review, on view M it is hard to see how the Supreme Court can avoid ultimately being faced with the difficult question whether the rate was confiscatory.[37] This perhaps seems undesirable, and might furnish a reason either for adopting view A, or for construing the due-process clause as not limiting the substance of administrative action.[38]

Having examined the authorities, it remains to discuss on principle views A and M.

In attempting to approach this matter on principle, one is met at the start with the difficulty that the distinction between the making and the application of law is frequently at bottom one of theory only. The theory that courts in deciding cases, even where it is necessary to lay down a new rule of law, are merely applying law, rests upon the fiction of the all-inclusiveness of law, containing in itself material for the solution of every possible legal question.[39] Why then, it may be asked, predicate differences upon mere theoretical abstraction? The answer is that in our system of government, with its separation of powers, we are committed to somewhat theoretical distinctions. There is a theory as to the judicial function, that is an application of law. If so, the nature of the judicial review in any case must depend upon the theoretical nature of the action being reviewed. This was worked out in the discussion of the sort of review applicable to court and legislative action.

Is administrative rate regulation judicial or legislative in nature?

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[37] The disposition made by the Supreme Court of the Ohio Valley case is somewhat puzzling. The court held that the commission order would be invalid unless the state would give an adequate review.

[38] As discussed in footnote 25.

[39] See Roscoe Pound, "Courts and Legislation," 7 AM. POL. SCI. REV. 361, 365 (1913).

It is easy to classify other forms of administrative regulation. Reparation suits, suits for damages based on the claim that past rates were excessive, are rather of a judicial nature;[40] general rules for the future, such as prescription of uniform accounts, are rather of a legislative nature.[41] But in the case of administrative rate regulation, classification is more difficult. It becomes necessary to examine the rate-regulating function.

Formerly there was little rate regulation as such, but a carrier was liable for the breach of its common-law duty to render reasonable service at reasonable rates. A shipper could sue the carrier, claiming a past rate unreasonable, and, if so found, could recover judgment for the excess.[42] The question of reasonableness then came up as a purely judicial question. Later, commissions were established to handle these technical questions.[43] Meanwhile it became common practice for legislatures to fix rates.[44] In 1906 the Interstate Commerce Commission was empowered to do so.[45] Now if the commission found an existing rate unreasonable it could fix a reasonable rate. Such is administrative rate regulation at present. Although damages for past breaches are still given, the point of emphasis has shifted. The important question before the commission is no longer whether a past rate was reasonable, but is, what is a reasonable rate?

The determination of what is a reasonable rate seems to partake

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[40] In I. C. C. *v.* Cincinnati Ry. Co., 167 U. S. 479, 499 (1897), the court said: "To inquire whether rates which have been charged and collected are reasonable . . . is a judicial act."

[41] I. C. C. *v.* Goodrich Transit Co., 224 U. S. 194 (1912), holds the provision empowering the commission to prescribe uniform amounts not an unconstitutional delegation of legislative power.

[42] Ashmole *v.* Wainwright, 2 Q. B. 837 (1842); Cowden *v.* Pacific Coast S. S. Co., 94 Cal. 470, 29 Pac. 873 (1892); Heiserman *v.* Burlington, etc. Ry. Co., 63 Iowa, 732, 18 N. W. 903 (1884); Peters *v.* Scioto Co., 42 Ohio St. 275 (1884). See MOORE, CARRIERS, 2 ed., p. 165.

[43] The Interstate Commerce Act (24 STAT. AT L. 379 (1887) enacted the common law that charges must be just and reasonable (§ 1), and provided for complaint to the commission of violations of the Act (§ 13), and for award of damages by the commission, (§ 16 as amended by 34 STAT AT L.. 584 (1906)), which, however, could be enforced only by a court (*ibid.*). Claims for reparation for past excessive rates might now be heard before the commission. Trier *v.* Chicago, etc. Ry. Co., 30 I. C. C. 352 (1914); Coomes *v.* Chicago, etc. Ry. Co., 13 I. C. C. 192 (1908).

[44] Chicago, etc. Ry. Co. *v.* Iowa, 94 U. S. 155 (1876); Peik *v.* Chicago, etc. Ry. Co., 94 U. S. 164 (1876).

[45] Section 15 as amended by the Hepburn Act of 1906, 34 STAT. AT L. 584.

of some of the characteristics both of judicial and of legislative action. It is a special rule for a particular case rather than one of general application. Investigations are, of course, common before legislation, but the investigation entered into by a commission before the determination of what is a reasonable rate, is of a rather judicial nature. Administrative rate regulation is said to be a laying down of a rule for the future, and as such legislative;[46] yet in many ways it resembles more a mandatory injunction than a legislative act. But certainly before commissions were given the rate-regulating power, courts had not ventured into that field; what rate regulation there was had been done by special act of the legislature. To this extent the holding that administrative rate regulation is quasi-legislative rather than quasi-judicial is indisputable. From the historical point of view, rate regulation is legislative in character. But the question as to its nature is of practical importance mainly in determining what shall be the theory of review and of the application of the due-process clause, and as regards those two questions it is submitted that the significant distinction is between a special rule of particular application and a general rule. On such a functional differentiation rate regulation should be classed as judicial in character.

The purpose of the paper is not, however, to pick one or another theory as to the nature of administrative rate regulation, but to point out that, as a result of our system of the separation of powers, as a result of the accepted construction of the due-process clause, there will be a difference in the nature of judicial review properly applicable to administrative rate regulation, depending on the view taken as to its nature. More specifically, there will be a difference as to the question before the courts on review, the extent of review necessary to determine that question, the basis for the constitutional right to review, and the nature of the question before the Supreme Court when the claim is made that a person has been deprived of his constitutional right to review. It is submitted that the problem regarding judicial review of administrative rate regulation should be determined according to the accepted

[46] In Prentis *v.* Atlantic Coast Line, 211 U. S. 210, 226 (1908), the court said: "The establishment of a rate is the making of a rule for the future, and therefore is an act legislative not judicial in kind." See I. C. C. *v.* Cincinnati, etc. Ry. Co., 167 U. S. 479, 499 (1897) *acc.*; R. R. *v.* Willcox, 194 N. Y. 383, 87 N. E. 517 (1909), *contra.*

principles of review as seen in the review of judicial decisions and of legislative acts, and that there should be no haphazard mingling of the principles seen in those two cases. For purposes of review there must be a clear differentiation of the judicial and legislative functions and of the sort of review properly applicable to each.

Laurence Curtis, 2d.

BOSTON, MASS.